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No. 99-6218

Supreme Court, U.S.
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In The

Supreme Court of the United States

WILBERT K. ROGERS,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Tennessee

BRIEF OF AMICUS CURIAE, TENNESSEE ASSOCIATION OF CRIMINAL DEFENSE ATTORNEYS, IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether the retroactive application of a judicial abolishment of the substantive rule of criminal law known as the "year-and-a-day rule" to an assault committed five years prior to that abolishment violates the Fourteenth Amendment of the United States Constitution?

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BRIEF OF AMICUS CURIAE, TENNESSEE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

STATEMENT OF THE INTERESTS OF AMICUS CURIAE

The Tennessee Association of Criminal Defense Lawyers (TACDL) files this amicus curiae brief pursuant to Supreme Court Rule 37.3(a), in support of the Petitioner, Wilbert Rogers. Consent was granted by W. Mark Ward, counsel for the Petitioner, and Michael E. Moore, Solicitor General for the State of Tennessee. The required letters of consent are filed with this brief.

The Tennessee Association of Criminal Defense Lawyers was incorporated in 1973 as a nonprofit organization and currently has seven hundred and twenty members. Its purpose is to provide education, training and support to lawyers who represent citizens of the State of Tennessee accused of crimes. The Association advocates a fair and effective criminal justice system in the courts, the legislature and wherever justice demands. One of the stated purposes of the organization is to protect and insure, by rule of law, those individual rights guaranteed by the constitutions of the United States and the State of Tennessee.

The question presented by this appeal is one which affects all citizens of the State of Tennessee, not just the named petitioner. The Tennessee Supreme Court's action in this case constitutes a marked departure from any prior, established practice. Its retroactive application denied the citizens of this State fair notice of the state of

the law, thus jeopardizing their rights to the fundamental fairness and due process guaranteed by the Fourteenth Amendment. The Tennessee Association of Criminal Defense Lawyers is concerned that this decision could significantly alter the ability of the criminally accused of this state to rely on the substantive laws in effect at the time of the commission of a crime, and concerned that a failure to expand the holding of *Bouie* to actions of this nature will result in further erosion of those important constitutional rights. For this reason, TACDL respectfully files this brief, in support of Mr. Rogers' arguments.

STATEMENT OF THE CASE

On May 7, 1994, the petitioner, Wilbert K. Rogers, assaulted the victim, stabbing him with a butcher knife. He was indicted on August 9, 1994, and charged with attempted first degree murder. The victim lingered in a coma for approximately sixteen months until his death in August of 1995. On September 12, 1995, a new indictment was returned by the Grand Jury of Shelby County, Tennessee, charging him with first degree murder.

Following a jury trial, Mr. Rogers was convicted of the lesser included offense of second degree murder and received a sentence of thirty-three years. On appeal to the Tennessee Court of Criminal Appeals, the petitioner argued the conviction could not stand because of the common law year-and-a-day rule, which provided that a citizen could not be charged with murder if death occurred more than a year and a day after the initial assault. *State v. Rogers*, 1997 WL 642309 (Tenn. Crim. App.

1997). The intermediate appellate court denied relief, holding that the year-and-a-day rule had been abolished by the Tennessee State Legislature in 1989, when it recodified the criminal code. The Court of Criminal Appeals reasoned that the year-and-a-day rule was a common law defense, and the failure of the Legislature to list it as an affirmative defense in the new code resulted in its abolition.

On appeal to the Tennessee Supreme Court, the verdict and sentence were upheld, but on different grounds. *State v. Rogers*, 992 S.W.2d 393 (Tenn. 1999). The Tennessee Supreme Court ruled that the year-and-a-day rule was not a common law defense, and was not abolished by the Legislature in 1989. The state conceded that it was a substantive element of the crime of murder. The Supreme Court found no justification for continuing to require the application of the year-and-a-day rule in the face of advances in modern medicine, however, and judicially abolished the rule.

The subject of this appeal, however, and the concern of amicus curiae, is not the abolition of the year-and-a-day rule by the Tennessee Supreme Court, but its retroactive application of the abolition to a crime which occurred almost five years to the day before the Supreme Court's pronouncement of its removal from the laws of the State of Tennessee.

SUMMARY OF THE ARGUMENT

The Fourteenth Amendment's guarantee of due process of law was violated by the retroactive application of

the Tennessee Supreme Court's abolition of the common law "year-and-a-day rule" in this case. This Court ruled, in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), that courts should not be permitted to do by judicial action, what legislatures are forbidden to do by ex post facto considerations. Although *Bouie* dealt with the judicial interpretation of a statute, the same considerations should apply when a court judicially abolishes a common law doctrine favorable to a defendant and applies it retroactively to convict him of a much greater crime than that for which he could otherwise be punished.

In Mr. Rogers' case, the Tennessee Supreme Court did not properly apply *Bouie* in making the decision on retroactive application. They cited the law of other states as their primary support for a finding that their action was not "unforeseeable" to the citizens of Tennessee, a practice specifically criticized in *Bouie*. *Id.* at 359. They gave little effect to the fact that the doctrine was well established in Tennessee, and had not been overturned, either by judicial or legislative action. Instead, they pointed to a failure of the appellate courts to cite frequently to the cases which recognized the doctrine, and language in a lower court decision, issued more than a year after the initial attack on this victim, which indicated a 1989 criminal code revision may have abolished it as a common law defense. *Rogers*, 992 S.W.2d at 402.

The abolition of the year-and-a-day rule was unforeseeable and constituted a substantial departure from the prior status of the common law in effect at the time of the commission of the crime in this case. Despite the Supreme Court's statement that the retroactivity of

their action "does not allow the State to obtain a conviction upon less proof, nor does its abolition impose criminal sanctions for conduct that was heretofore innocent," *Rogers* at 402, there is no analysis of those contentions, and nothing in the record to support such a finding. In fact, the action of the Court in Mr. Rogers' case would have violated all of the prohibitions against ex post facto laws if done by a legislative body. *Calder v. Bull*, 3 Dall. 386 (1798), *Rogers* at 402, citing *State v. Pearson*, 858 S.W.2d 879, 881 (Tenn. 1993); *Miller v. State*, 584 S.W.2d 758, 761 (Tenn. 1979) (adopting the categories identified in *Calder* and stating that "every law which, in relation to the offense or its consequences, alters the situation of a person to his disadvantage" constitutes an ex post facto law).

Of great concern to amicus curiae is the fact that the Supreme Court justified its action by reliance on cases involving civil common law, which tenets do not take into consideration the rights of the criminally accused, or the requirements of due process of law in a criminal setting. The opinion also appears to require the citizens of Tennessee to become learned in the law of all the states of this nation in order to "foresee" whether or not the criminal laws of this state might be changed, without prior notice from its own courts or state legislature. Finally, the implications of permitting the highest Court of the State to single out individual citizens for retroactive treatment, another action not legislatively permitted under the ex post facto laws, should be given great consideration by this Court, and the conviction for murder should be reversed.

ARGUMENT

The Tennessee Supreme Court reversed a hundred years of common law precedent in this case, and gave it retroactive application so as to deprive Wilbert Rogers of his right to rely on a principle of law which existed at the time his crime was committed. It did so by judicially abolishing the well established common law requirement that a death occur within a year and a day of the initial assault to constitute a murder. The action of the Supreme Court was not based on any valid precedent, thus its application to Mr. Rogers violated the Fourteenth Amendment's due process requirements of fair warning and fundamental fairness and constituted an unforeseeable change in the law which should not have been applied retroactively. *Bouie v. City of Columbia*, 378 U.S. 347 (1964). This case also requires an extension of the principles regarding the retroactive application of judicial decision-making set forth in *Bouie* to other circumstances in which the ex post facto laws would bar the same action by a legislative body.

1. The Fourteenth Amendment's guarantee of due process of law was violated by the retroactive application of the Tennessee Supreme Court's abolition of common law "year-and-a-day rule."

The Tennessee Supreme Court noted in its opinion that the year-and-a-day rule was an ancient concept dating back to at least the thirteenth century. It was recognized by the United States Supreme Court as early as 1894, *Louisville, Evansville & St. Louis R.R. Co. v. Clarke*, 152 U.S. 230 (1894), and cited in Tennessee case law as an

established principle of common law in 1907. *Percer v. State*, 103 S.W. 780 (Tenn. 1907). The Court found the rule was not an affirmative defense to a charge of murder, but "even more powerful than a defense because it entirely precludes a murder prosecution." *State v. Rogers*, 992 S.W.2d 393, 400 (Tenn. 1999). The Court also agreed with petitioner that this important element had not been abolished by a sweeping revision of the criminal codes by the Tennessee Legislature in 1989. *Id.* at 400.

The Court found, instead, that this common law principal had outlived its usefulness and "advances in medical science, improved trial procedure, and sentencing reform have eroded the reasons originally supporting the common law year-and-a-day rule." *Id.* at 401. Based primarily on case law from other states which had previously abandoned the rule, the Court declared its intention to abolish it in Tennessee, as well. The Court then found there would be no due process violation in applying the abolition of the law retroactively to Mr. Rogers' case because their action was not unforeseeable. Their decision with regard to foreseeability was based on: 1) the abolition of the rule by other states, 2) language from a lower court opinion issued after the initial attack in this case, 3) the failure of the 1989 code revision to incorporate the doctrine into the new statutory scheme, and 4) an unsupported opinion that retroactive application would not violate certain of the ex post facto rules which apply to legislative actions. *Id.* at 402.

The Court's opinion is internally inconsistent, inconsistent with the laws of Tennessee and inconsistent with the law established by this Court in *Bouie*. Despite the Court's statement to the contrary, reliance on the factors

set forth above to support a retroactive application of the abolition of a common law doctrine are not supported by the legal precedent of this state. The Court noted it has "not hesitated to abolish obsolete common-law doctrines," and recognized "a special duty to do so where it is the Court, rather than the Legislature, which has recognized and nurtured the common law rule," citing to *Dupuis v. Hand*, 814 S.W.2d 340, 345 (Tenn. 1991) (abolishing the tort of alienation of affection). *Dupuis*, in turn cites to *Hanover v. Ruch*, 809 S.W.2d 893 (Tenn. 1991) (abolishing the tort of criminal conversation); *Kilbourne v. Hanzelick*, 648 S.W.2d 932, 934 (Tenn. 1983) (abolishing discriminatory rule denying liability of wife for support of husband); *Davis v. Davis*, 657 S.W.2d 753, 758 (Tenn. 1983) (abolishing interspousal tort immunity doctrine); and *Ford Motor Co. v. Lonon*, 217 Tenn. 400, 398 S.W.2d 240 (1966) (abolishing privity requirement in strict tort). *Rogers* at 400.

The cases cited above are all civil cases, however, in which tenets of the civil common law were abolished. It has long been recognized that civil matters are not subject to the strictures of the ex post facto laws. *Calder v. Bull*, 3 Dall. 386 (1798). The cases cited by the Court did not rely on ex post facto principles, or the concept of due process, but rather on the provision against "retrospective laws" found in Art. I, Sec. 20 of the Tennessee Constitution. The standard for retroactive application in such cases is clearly different from those which apply to criminal cases and should not be cited as support for these actions. *Hanover, supra* at 896. In fact, the Tennessee Supreme Court does not appear to have ever acted to abolish a tenet of common law doctrine in the criminal context,

thus it cannot be said that this action was foreseeable to the citizens of Tennessee.

Other reasons given by the Court to support retroactive application also fall short of proving that a change in the law was foreseeable to the average citizen of Tennessee. The Court speculated that the infrequency with which the year-and-a-day rule had been cited by the appellate courts supported a finding that it was obsolete and little used in the state. *Rogers* at 396. In fact, it is more indicative of the fact that cases in which the victim did not die within a year-and-a-day were not charged as murder cases, but rather as lesser charges, as the doctrine requires. Nor should an intermediate appellate court opinion issued in 1995 be considered adequate notice to Mr. Rogers that the year-and-a-day rule was subject to change. This opinion was issued more than a year after the initial attack occurred. *State v. Ruane*, 912 S.W.2d 766, 774 (Tenn. Crim. App. 1995). *Ruane* merely noted that the "defense" of the year-and-a-day rule may have been abrogated by the 1989 revisions to the Tennessee criminal code. The accuracy of this finding was subsequently disavowed by the Supreme Court in Mr. Rogers' own case, where it was noted the doctrine was not a defense, and could not have been abolished by the code revisions in any case. *Rogers* at 400. It is unfair for the Court to say the faulty rationale of the lower court, issued long after the commission of the crime, put this petitioner on notice of a pending change in a century old tenet of the common law. Likewise, the Court's allegation that the failure of the 1989 code revision to mention the doctrine lacks persuasion. The year-and-a-day rule was never codified,

and again according to the *Rogers* opinion, could not have been abolished by the Legislature. *Rogers* at 400.

Although "emphasizing" that "abolition of the rule does not allow the State to obtain a conviction upon less proof, nor does its abolition impose criminal sanctions for conduct that was heretofore innocent," *Rogers* at 402, the Court provided no analysis for those contentions, and nothing in the record supports such findings. In actuality, the Court removed the State's burden of proving a previously required element of the offense, clearly a lesser evidentiary standard for the State. *Carmell v. Texas*, ___ U.S. ___, 120 S.Ct. 1620, 1627 (2000). It also increased the crime for which Mr. Rogers was accountable from attempted murder to first degree murder. Thus, although it may not have imposed a criminal sanction on previously "innocent" behavior, it certainly violated two other standards established in *Calder* by creating "a law which aggravates a crime or makes it greater than when it was committed" or "a law that changes punishment or inflicts a greater punishment than the law annexed to the crime when it was committed." These are clearly actions which the Tennessee Legislature would not be permitted to enact under either the state or federal ex post facto rules, and there is absolutely no rationale for permitting an identical encroachment on the due process rights of the citizen accused in Tennessee under the auspices of retroactive judicial action.

The Tennessee Supreme Court overruled a consistent line of procedural decisions and a long established tenet of common law, and gave it retroactive effect, depriving Mr. Rogers of due process of law "in its primary sense of

an opportunity to be heard and to defend (his) substantive right." *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930). This unforeseeable state court construction of a criminal statute, applied retroactively, deprived the petitioner of fair warning that his contemplated conduct would constitute a greater crime than it would have in the past. *Bouie* at 1703. If the actions of this state's highest court are permitted to stand in this case, further arbitrary, retroactive applications of this nature can be expected, and neither defendants, nor counsel, will be able to predict in advance what actions might be punished, or what the punishment for one's actions might be.

2. This case requires an extension of the principles regarding the retroactive application of judicial decision-making set forth in *Bouie v. Columbia* to other circumstances in which the ex post facto laws would bar the same action by a legislative body.

The *Bouie* decision applied the rationale of the ex post facto laws, generally recognized as being applicable only to actions of a legislature, *Frank v. Magnum*, 237 U.S. 309 (1915), to the retroactive application of a court's statutory interpretation. The same evils which arise when a legislative body changes the laws after the commission of a crime, exposing a defendant to greater punishment, or to the criminalization of actions which were not criminal at the time, were found offensive to the Due Process provision of the Fourteenth Amendment when accomplished by judicial action. *Bouie* involved the judicial interpretation of a narrowly written statute which enlarged the activities subject to criminal penalty beyond previous interpretations by the state courts. *Marks v.*

United States, 430 U.S. 188 (1977). The harm the Court sought to protect in *Bouie* was the failure of the state to provide fair warning to its citizens that the law would be applied in such a fashion before applying it retroactively.

Due process concerns also parallel other aspects of the ex post facto provisions. One important reason for these laws was to ensure legislative enactments would "give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981); *Calder* at 388; *Miller v. Florida*, 482 U.S. 423, (1987). Another reason the Ex Post Facto Clauses were included in the Constitution was to assure that federal and state legislatures were restrained from enacting arbitrary or vindictive legislation and preventing legislative abuses. *Calder* at 389. The obvious reason for applying these checks on the legislatures was the political pressures faced by elected legislators who need to maintain favor with voters and supporters and might act against a disenfranchised, unpopular individual or group of individuals for political gain.

Unlike federal judges, the appellate judges of Tennessee, and many other states, are subject to popular elections for retention. In 1994, the Tennessee Legislature established the "Tennessee Plan" for the selection and retention of appellate judges. *Tenn. Code Ann.* § 17-4-114. Although nominees for the bench are selected by a bipartisan commission and appointed by the governor, incumbents must stand for reelection every eight years. In 1996, Justice Penny White was removed from the Tennessee Supreme Court through this process, in large part because of the public perception, widely publicized across the state, that she had ruled too advantageously

for an appellant charged with an especially heinous crime. Nor is this politicalization of the judiciary limited to the state of Tennessee. *See*, John Gibeaut, *"Taking Aim,"* ABA Journal, Vol. 82, Nov. 1996.

Amicus curiae does not contend that any of the justices on the Tennessee Court acted for political gain, or any other improper purpose in this, or any other case. Yet the fact that they must stand for popular election cannot be ignored, and the need to protect an individual's rights to a fair trial and due process of law, and guard against the undue influence of public opinion, must be given heightened consideration in view of these recent, public changes. Because of the requirement that Tennessee's judges stand for reelection, the rationale for applying the same standards required by the ex post facto cases to their retroactive decision-making is stronger than it might have been in the past. Differences which might have arguably existed between the application of a ban against retroactive law-making on the part of legislatures, and retroactive interpretation on the part of the judiciary, are no longer so distinct as to require separate standards of application.

Likewise, the fact that the action taken by the Supreme Court in this case is more closely related to legislative action than to the normal interpretive functions of the Court should be given considerable weight in determining whether to hold the Court to the strict requirements of *Bouie*. The Court itself noted "a special duty to [abolish obsolete common-law doctrines] where it is the Court, rather than the Legislature, which has recognized and nurtured the common law rule." *Rogers* at 400.

Yet the Tennessee Legislature has indicated that the common law should be used to interpret the current provisions of the criminal code, making the state of the common law of continuing importance and application. *Tenn. Code Ann.* § 39-11-104. The nature of this action, in and of itself, therefore, adds support to the argument of amicus curiae that *Bouie* should be broadened to preserve due process of law in similar circumstances.

The Tennessee Association of Criminal Defense Lawyers respectfully requests that this Court extend the rationale of *Bouie* to protect the citizens of this, and every state, from arbitrary, retroactive applications of judicial decision-making which create a climate of uncertainty and the possibility of unfair or vindictive law-making from the bench. Because these safeguards were not applied in Mr. Rogers' case, his conviction must be set aside.

CONCLUSION

The opinion the Supreme Court of Tennessee in Wilbert Rogers' case should be reversed. The Court's action was a significant departure from the longstanding common law and case precedents in this state. As it cannot be characterized as an expected or anticipated development in the law, retroactive application of the judicial abolishment of the year-and-a-day rule to Petitioner violated the Fourteenth Amendment of the United States Constitution. This case should be remanded to the Supreme Court

of Tennessee for a determination as to whether Petitioner's sentence may be modified to a lesser offense or whether a new trial is required.

Respectfully submitted,

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